

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000050-MR

DWIGHT THURMAN;
JO CAROL THURMAN;
DWAINE THURMAN; AND
PAMELA JO THURMAN

APPELLANTS

v. APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 08-CI-00375

JOE OLIVER HUTCHISON

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; KELLER, JUDGE; LAMBERT, SENIOR JUDGE.

TAYLOR, CHIEF JUDGE: Dwight Thurman, Jo Carol Thurman, Dwaine Thurman, and Pamela Jo Thurman (collectively referred to as appellants) bring this appeal from a December 9, 2009, judgment of the Wayne Circuit Court adjudicating that a prescriptive right-of-way easement exists over appellants' real

property, to access adjoining real property owned by Joe Oliver Hutchison and heirs. We affirm.

The genesis of this dispute lies with a paved roadway that begins at Highway 1568 then travels across appellants' real property and thereupon continues across real property owned by Donald Dunagan and proceeds up a mountain to real property now owned by Cobb-Vantress, Incorporated. Cobb-Vantress currently operates chicken houses upon the property. The Cobb-Vantress property was previously owned by Avian Farms, which also operated chicken houses on the property. Avian had acquired the property from appellee, Joe Oliver Hutchison. Joe currently owns other real property that is located adjacent to the Cobb-Vantress property; Joe had also previously operated chicken houses thereon. As Joe's adjacent real property also can be accessed from the roadway, Joe's son, Gary Hutchison, sought to remove timber from his father's real property and requested permission from appellants to use the roadway for such purpose. The request was ultimately denied by appellants.

Consequently, Joe filed the instant action claiming, *inter alia*, a prescriptive easement existed in the roadway that crossed appellants' real property. The circuit court conducted a bench trial without a jury. By a December 9, 2009, judgment, the circuit court found in favor of Joe and determined that a prescriptive right-of-way easement existed in the roadway that crossed appellants' real property for the purpose of accessing adjoining properties.

Appellants contend that the circuit court erroneously found that Joe acquired a prescriptive right-of-way easement in the roadway that crosses their respective properties. For the reasons hereinafter set forth, we disagree.

This case was tried by the court without a jury pursuant to Kentucky Rules of Civil Procedure (CR) 52.01. Thereunder, the circuit court's findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the . . . court to judge the credibility of the witnesses" CR 52.01. A circuit court's finding of fact is clearly erroneous if not supported by substantial evidence of a probative value. *Carroll v. Meredith*, 59 S.W.3d 484 (Ky. App. 2001). As fact-finder, it is within the sole province of the circuit court to judge the credibility of testimony and evidence. *Ironton Fire Brick Co. v. Burchett*, 288 S.W.2d 47 (Ky. 1956). However, we review issues of law *de novo*.

It is well-established that a right-of-way easement may be acquired by prescription. *Illinois Ctr. R. Co. v. Roberts*, 928 S.W.2d 822 (Ky. App. 1996). To do so, the claimant must prove "actual, hostile, open and notorious, exclusive, and continuous possession" for a period of fifteen years. *Columbia Gas Transmission Corp. v. Consol of Ky., Inc.*, 15 S.W.3d 727, 730 (Ky. 2000); *see also* Kentucky Revised Statutes (KRS) 413.010. These elements must be demonstrated by clear and convincing evidence. *See Carroll v. Meredith*, 59 S.W.3d 484 (Ky. App. 2001).

In its December 9, 2009, judgment, the circuit court found:

6. That testimony was presented that showed that the passway had been in existence for a period in excess of

50 years, that [Hutchison] has used the passway for purposes of accessing the property described herein and used it without permission from any person or entity.

7. The Defendant [Donald] Dunagan recognized the right of Joe Oliver Hutchison to travel across said passway.

8. That the Defendants Thurman and Defendant Dunagan had leased property to Cobb-Vantress, which leases repeatedly referred to an existing road.

. . . .

1. The passway in question has been used by the Plaintiff Joe Oliver Hutchison and his predecessors in title openly, notoriously, continuously, adversely and hostilely for a period of fifteen years or more.

2. That by virtue of the above, the Plaintiff has established a prescriptive easement across the lands of the Defendants Thurman and the lands of Defendant Donald Dunagan.

3. That the Plaintiff is entitled to a private passway across the roadway that exists that runs from Strawberry Road to the property of Cobb-Vantress.

Specifically, appellants believe that Joe failed to establish by clear and convincing evidence the elements necessary to obtain a prescriptive easement. In particular, appellants maintain that the roadway was only utilized by Joe and his son, Gary, with their express permission, was not otherwise utilized in a hostile manner, was not utilized open and notoriously, was not utilized continuously, and was not utilized for the requisite fifteen-year period.

The record demonstrates that the evidence presented at the hearing was sufficient to support the circuit court's finding that a prescriptive easement

existed in the roadway that transverses appellants' real property. Donald Dunagan testified that since the late 1970s he owned a tract of real property over which the roadway travels. He testified that a passway had existed for several years where the current roadway is located. Dunagan stated that the passway was impassable to motor vehicles and could be only walked by individuals or transversed by farm machinery. He remembered one individual (Dave Ryan) who lived on the mountain some fifty years ago near the passway and recalled that a postal employee walked the passway to deliver mail to Ryan. Dunagan also recounted that a coal company constructed a gravel roadway in place of the old passway in the mid-1970s. In exchange for using the roadway, the coal company gave Dunagan coal as compensation. Dunagan stated that the coal company ceased operations sometime in the mid-1980s. After such time, Dunagan testified that Joe operated chicken houses on his property located on the mountain and utilized the roadway for ingress and egress thereto. Dunagan recounted that he executed a "lease agreement" with Avian granting it a right-of-way easement to access their chicken houses over the roadway for a term of twenty years on July 16, 1991. Subsequently, Dunagan stated that Avian was sold to Cobb-Vantress and that Cobb-Vantress also utilized the roadway for ingress and egress under a lease agreement. Gary, Joe's son, also testified that throughout his lifetime he had traveled the roadway unencumbered and without permission from anyone for ingress and egress to his father's property on the mountain. He also stated that he was unaware of his father, Joe, ever seeking permission from anyone to use the

roadway.

The above testimony of Dunagan and Gary was sufficient to support the circuit court's finding that a prescriptive easement existed in the roadway that crossed appellants' real property. As to the element of hostile use, Gary testified that he had utilized the roadway for ingress and egress throughout his lifetime to access his father's property and had done so without appellants' permission. In fact, Gary never believed it was incumbent upon him to request appellants' permission to travel the roadway. We believe Gary's testimony was sufficient to establish that he traveled the roadway without permission and in a hostile manner under a claim of right to do so.

The element of open and notorious use was satisfied by both Dunagan and Gary's testimony. Dunagan recounted a postal employee transversing the roadway on foot to deliver mail to Ryan and stated that he remembered other individuals also utilizing the roadway. And again, Gary testified to freely traveling the roadway to access his father's property throughout his lifetime.

Also, the evidence was sufficient to establish continuous use for the statutory fifteen-year period. To prove this, Gary's testimony alone was sufficient. As noted, he affirmatively testified to traveling the roadway repeatedly during his lifetime to access his father's property. At the time of the bench trial, Gary was sixty-one years old.

Based on the substantial evidence presented, we cannot conclude that the circuit court's findings were clearly erroneous. Accordingly, we must concur

that the circuit court properly found that a prescriptive right-of-way easement existed in the roadway that transversed appellants' real property. We view any remaining arguments as moot or without merit.

For the foregoing reasons, the judgment of the Wayne Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Ryan D. Morrow
Somerset, Kentucky

BRIEF FOR APPELLEE:

James M. Frazer
Monticello, Kentucky